IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

WEDNESDAY, THE 11TH APRIL 2007 / 21ST CHAITHRA 1929

CRL.A.No. 1653 of 2003()

(S.C.No.52/2001 OF THE ADDL. DISTRICT AND SESSIONS COURT, FAST TRACK (ADHOC I), KOZHIKODE.)

APPELLANT: ACCUSED

VIJAYAN S/O. KUNHIRAMAN NAIR, THAYATH VEETTIL, KARINGODU, THOTTIPALAM, KOZHIKODE.

BY ADV. SRI.K.B.SAJEESH

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY DIRECTOR GENERAL OF PROSECUTION SRI.P.G.THAMPI.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 11/04/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M. JAMES, J.

Criminal Appeal No. 1653 of 2003

Dated this the 11th day of April, 2007.

J U D G M E N T

The accused in S.C.No.52/2001, on the file of the Additional Sessions Court, Fast Track (Ad hoc I), Kozhikode, is the appellant. He was found guilty of the offence punishable under Section 376 IPC, and, therefore, was convicted and sentenced to undergo rigorous imprisonment for a period of five years, and to pay a fine of Rs.15,000/=, in default, to undergo simple imprisonment for a further period of one year. It was also directed that on the event of the realisation of fine, Rs.10,000/= shall be given to PW.2, the victim, as compensation. Hence, this appeal challenging the said conviction and sentence.

2. The prosecution case in brief is that PW.2, the prosecutrix, then aged about 17 years, was the neighbour of the appellant. She is belonging to Scheduled Caste community. Her father was a coolie. Her mother was also engaged in doing coolie works. Pw.2, her brother, is a coconut climber. PW.2 was approached by the appellant, when no one else was there in the house, and

according to PW.2, despite her opposition, committed rape on her. However, she kept quiet of the incident, and did not report the same to her parents, as he promised to marry her. When her period missed, she informed the appellant of the same. But he evaded her request for marriage. When PW.2 insisted, the appellant advised her for an abortion. But she refused to undergo the same. Thus, when she became in the advanced stage of pregnancy, one Chandran, as well as the appellant, along with his relatives, threatened to do away PW.2 and others, and, therefore, under threat, she was taken to the hospital of PW.9, where the delivery was induced. A pre-mature baby was born. PW.2 was unconscious and she regained consciousness on the next day. The infant was forcefully taken away from PW.2 to Holy Infant Mary's Convent, Vythiri, and the child was admitted as an orphan. At that time, the father and relatives of the appellant were present. However, they informed to PW.2 that because of the pre-mature delivery, the child has to be kept in incubator, and would be returned thereafter. But the child was never brought back, and the Investigating Officers did not conduct any investigation on that aspect. No records were produced by PW.9, the Manager of the hospital where delivery took place. PW.10, the U.D. Clerk of the Balussery Panchayat has produced Ext.P8, the Birth Register of the Panchayat, for the year 1999. Under Ext.P8(a) endorsement, PW.2 had delivered a male child

on 26.6.1998, the name of PW.2 and that of the appellant are shown against the column of mother and father respectively. On the appellant refusing to marry, the parents of PW.2 and herself went before the PW.5, the Asst. Sub Inspector of Police, Thottilpalam Police Station, and gave a complaint, which has been reduced in writing, Ext.P2 First Information statement, basing on which Ext.P2(a) First Information Report, as Crime No.66/1999 of that police station was registered, under Sections 406 and 376 IPC. However, after investigation, the offence under Section 406 had been altered as Sections 417 and 376 IPC.

3. PW.1 was the medical officer who conducted the potency test of the appellant and issued Ext.P1 certificate. PW.4 is another medical officer who examined PW.2, the victim, and issued Ext.P4 medical certificate, dated 14.5.1999, certifying that PW.2 was pregnant by 26 weeks', on the date of examination. PWs. 6, 7 and 8 were the investigating officers who conducted the investigation.

4. The prosecution examined 10 witnesses and marked 8 documents. Exts.X1 to X3 were also marked. DW.1 was examined, and Ext.D1, the contradiction of PW.2, the victim, was marked during

her cross examination by the defence. The learned Additional Sessions Judge, on appreciation of the evidence, held the appellant guilty, and, therefore, convicted and sentenced him, as stated above.

5. When the appeal came up for consideration, the learned counsel appearing for the appellant submitted that the evidence of PW.2 alone is insufficient to enter into a conviction. Counsel also submitted that there is no evidence available to show that it was the appellant who impregnated PW.2, as alleged against him. Yet another contention of the counsel is that the evidence of DW.1 and Ext.X1 agreement cannot be rejected. Hence, prayed that the conviction and sentence of the court below may be set aside.

6. During the hearing, I have gone through the depositions of each witness. I had surprisingly found that none of the investigating officers, Pws.6 to 8, had investigated about the hospital in which the prosecutrix was admitted and treated, and delivery took place. They also did not seize any documents from the hospital. Where the child was, after the delivery, had not been investigated. The prosecution also did not bring out, what happened to the infant after the delivery, and during the completion of the investigation, and conduct of the trial, whether the child was alive or not. PW.7, the

investigating officer, has deposed that he did not investigate about the delivery of the child by PW.2. PW.8 further deposed that he did not investigate, in which hospital the delivery took place, and also to the orphanage or convent, the child was entrusted with.

7. Both PW.2 and her parents had deposed that Chandran who is belonging to their community and Secretary of Pulayar Maha Sabha, was forcing her for an abortion, and when PW.2 refused, they were threatened with dare consequences. That was the reason why, even before the completion of the pregnancy, PW.2, her parents, and PW.3, her brother, agreed to go to the hospital of PW.9. In the box, PW.9 had deposed that all the records prior to the year 2000 had been destroyed by the hospital authorities.

8. DW.1, Chandran, was cited and examined by the defence. He deposed that PW.2 was impregnated by one Babu, and as per Ext.X1 agreement entered into between the said Babu and PW.2, the former paid an amount of Rs.10,000/= to PW.2, and they have settled the matter among themselves. Ext.X1 is the original of the agreement. After the defence evidence, PW.2 was re-called and re-examined. Ext.X1 was put to her. She denied the contents, the transactions mentioned therein, involving herself and one Babu, the

receipt of an amount of Rs.10,000/=, and the alleged signature of PW.2 contained therein. The consistent stand of PW.2 in the box was that she was threatened and forced for an abortion only at the instance of DW.1, Chandran.

9. While the appeal was heard, as the investigating officers did not investigate the relevant matters regarding the delivery of the child by PW.2, the forceful taking away of the infant by the relatives of the appellant to the convent, the non investigation about the infant thereafter, the non seizing of the documents relating to the treatment and delivery of the child by PW.2, the non questioning of the doctor who took the delivery of PW.2, and also the evidence of DW.1, Chandran, who was alleged to be the person involved in every acts of the victim and her relatives, on behalf of the appellant, I have directed the Director General of Prosecution to verify whether the child was alive, DW.1, Chandran, whom Pws.2 and 3, had been referring in their depositions is one and the same person, and also whether there is any document relating to the delivery of the child by PW.2 in the hospital of PW.9. The local Circle Inspector of Police went around, collected information, and reported the same to the Director General of Prosecution, that the infant was taken away from the possession of PW.2, after the delivery and was entrusted to Holy Infant Mary's

Convent, Vythiri. The infant was taken away by saying that the infant has to be kept in incubation, as the child was born pre-maturely. After examination of the register kept in the convent, it was reported that the child was admitted on 28.6.1999, and the date of birth was 21.6.1999. However, the child died in the hospital on 25.7.1999. It was further stated that DW.1, Chandran, is the same person, who had accompanied PW.2 and others, and who threatened PW.2 and their family for an abortion of the pregnancy and also for subjecting PW.2 for pre-mature delivery.

10. Stating the above facts, the Director General of Prosecution has filed a statement before this Court.

11. As the materials made available before this Court, during the hearing of the appeal, cannot be accepted as an evidence in this case, particularly, against the appellant, I am not considering the same.

12. In the above facts situation, I have proceeded to examine the evidence available on record. I have repeatedly gone through the evidence of PW.2, the victim, at the instance of the counsel for the appellant. PW.2 has categorically stated that the

appellant had entered her house, when there was no one else, and committed rape on her, overcoming her resistance. However, he assured PW.2 of marriage, and, therefore, she kept quiet, without complaining to any one, including her parents. Though many suggestions were made to PW.2 during her examination, nothing had been brought out to challenge her consistent version that it was the appellant who committed rape on her, and impregnated her. She had deposed that after the delivery, the father and relatives of the appellant, had gone to the hospital for taking away the child, from her. If the appellant was not involved, there was no reason for the father and relatives of the appellant to go and take away the child. There is no serious challenge to these aspects from the appellant. Because of threat from DW.1 and others, PW.2 and her family members had agreed to even to go for a pre-mature delivery. They also believed that the child would be kept in incubation, as informed to them. But the child was entrusted with a convent.

13. According to PW.10, the clerk of the Panchayat, the date of birth of the child was on 26.6.1998. The correct date of delivery is not available, as the investigating officers have not investigated on that aspect. However, Ext.P2 First information statement was recorded, and Ext.P2(a) First Information Report was

registered on 12.5.1999. Even according to the prosecution, and as per the evidence of PW.4, PW.2 was pregnant by 26 weeks. Therefore, before filing the final report, the investigating officers, Pws.6 to 8, ought to have investigated and ascertained, when PW.2 delivered, where and what was the condition of the child so delivered. It is surprising to note that none of them had bothered to investigate not only on these aspects, but also the post delivery facts, after the First Information Statement stage, on additionally questioning PW.2, before the final report was filed.

14. The conduct of DW.1 is another important factor to be noticed. He was the person who was all along been with Pws.2 and 3, and their relatives. Even then, he created Ext.X1 record and produced it before the court below, putting forward another version against the total prosecution story.

15. As discussed by the court below, in paragraph 15, Ext.X1 was executed in a stamp paper, which was purchased in the name of PW.2, on 29.6.1999. It is improbable, after the registration of the Crime on 12.5.1999, that PW.2 or her relatives would venture to hush up the matter, without the involvement of the investigating officer. Moreover, even in the final report or before that, none of the

investigating officers had been informed of the execution of Ext.X1 agreement, and the same had not been brought to their notice. Therefore, the lower court has rightly rejected the evidence of DW.1 and Ext.X1.

16. The fact to be appreciated is whether the evidence of PW.1 could be appreciated and the appellant could be held responsible for the offence committed by him. Except making bald suggestions here and there, there was no defence evidence adduced or any material contradictions brought out from PW.2 to doubt her evidence. There is no case that PW.2 was a consenting party at any time. The case of the defence is one of the total denial and the case have been falsely foisted, because the appellant is belonging to a particular political party of the locality, who was an eye sore to another majority party of the area. It is true that the evidence of PW.2 alone is there on record against the appellant. As discussed above, the investigating officers had not done a proper investigation. But even if the investigation is improper, unless it prejudice the interest of the accused, or affects the prosecution case, the whole case need not be thrown out. If the evidence otherwise available on record through the prosecutrix, PW.2, is trustworthy and instills confidence in the mind of the court, the same could be accepted and acted upon for entering

into a conviction against the appellant. In the case at hand, after repeated reading of evidence of PW.2 and re-appreciation of the same, at the instance of the learned counsel for the appellant, I find that there is nothing to reject the evidence of PW.2. Therefore, I hold that it was the appellant who committed rape on PW.2, the girl then aged 17 years, from the neighborhood and belonging to the Scheduled Caste community, and thus impregnated her, against her will and without her consent. The appellant is capable of impregnating a woman, as certified under Ext.P1 by PW.1. Therefore, I sustain the conviction of the appellant by the trial court, under Section 376 IPC.

17. The learned counsel for the appellant submitted that the sentence of five years rigorous imprisonment is very high. The sentence prescribed under Section 376 IPC should not be less than seven years, but it may be for life or which may extend to 10 years with fine. However, the proviso to Section 376 lays down that for adequate and special reasons, the sentence of imprisonment could be for a term of less than 7 years. The appellant was 29 years at the time of sentencing. He stated before the court below that he has got an aged father and mother, and they are depending on the appellant.

18. During the hearing of the appeal, the learned counsel for the appellant submitted that the petitioner is married and he is having a child. It is also submitted that if the appellant is incarcerated for a longer period, his family would be put into starvation. The prosecution has brought out during the hearing of the appeal that PW.2 is married and leading a quiet life. Both the prosecutrix and the appellant are neighbours.

19. Considering the circumstances, I am of the view that the facts submitted by the counsel could be accepted as adequate reasons for reducing the sentence. Therefore, I modify and reduce the sentence of rigorous imprisonment from five years to three years. The fine and default sentence thereunder imposed by the court below are sustained. The appellant is entitled for set off as per the law.

20. The Criminal Appeal is partly allowed as above.

21. Before parting with this judgment, as discussed above, I find, the investigating officers, PWs. 6 to 8 had not done the investigation, as required of them. The learned Director General of Prosecution submitted that PW.6, M.Velayudhan, was the Circle Inspector of Police, who since retired from service, and is residing at

Koyilandy, Kozhikode District. PW.7, K.Balakrishnan is now working as Deputy Superintendent of Police, State Special Branch (SSB), Kozhikode Rural, Vadakara. PW.8, C.Purushothaman Adiyodi, is now working as Circle Inspector of Police, Sulthan Bathery, Wayanad District. PW.7 admitted in the box that he did not even investigate whether a child was delivered by PW.2. PW.8 also has conceded while in the box, that he did not investigate in which hospital the delivery took place, and to which convent the infant was entrusted with. After the registration of Ext.P2(a) First Information report, and during the investigation, many events took place, involving the innocent victim PW.2 and her family. The successive investigating officers, Pws.6 to 8, had failed to take any steps to protect the interest of PW.2 and her family, as well as the new born infant. I am of the opinion that the investigating officers ought to have been more careful in their investigations, where the victims are woman, and particularly when there are probability of high handed actions from the part of others. There is callous indifference and apathy, as well as deliberate inaction on the part of all the investigating officers. Therefore, a copy of this judgment be forwarded to the Home Secretary to the Government of Kerala, for appropriate action, on these officials.

22. I have already discussed about the involvement of DW.1, Chandran, and his production of Ext.X1 agreement. I have also out rightly rejected the evidence of DW.1, as well as Ext.X1 agreement. He was wholly associated with PW.2 and her family members. He was instrumental in forcing PW.2 to undergo abortion. He was all along been supporting the appellant on different pretext. At last, he took PW.2 and her other family members to the hospital of PW.9, and induced a delivery, before the due date. The infant was handed over to Holy Infant Mary's convent, at Vythiri. He also misrepresented to PW.2 and others that the child is kept in incubation and brought back thereafter. After doing all these misdeeds, he even ventured to appear before the court as a defence witness, DW.1 and produced Ext.X1 bringing about a new and different version, which had been completely denied by PW.2, when she was re-called and re-examined. Thus, DW.1 had intentionally given false evidence during the criminal trial and fabricated false evidence, Ext.X1, for the purpose of being used, during the criminal trial. Therefore, send a copy of this judgment to the trial court for proceeding against DW.1, Chandran, under Section 193 IPC. On receipt of a copy of this judgment, the court below shall proceed against DW.1, Chandran, in accordance with the law.

A copy of the statement, dated 29.3.2007, filed by the Director General of Prosecution, along with the records thereon, shall also be sent to the court below.

J.M. JAMES,
JUDGE

nj.